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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-914

GEORGE P. BAKER, RICHARD C. BOND, AND JERVIS LANGDON, JR., TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR,

Petitioners,

vs.

INDIANA HARBOR BELT RAILROAD COMPANY, MEMBERS OF THE COMMITTEE OF INTERLINE RAILROADS: THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., AND LOUISVILLE AND NASHVILLE RAILROAD COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

MEMORANDUM OF RESPONDENT, CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY.

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Gunthorp-Warren Printing Company, Chicago • 346-1717

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MEMORANDUM OF RESPONDENT, CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY.

The Trustees of the property of Penn Central Transportation Company (Penn Central) have filed a Petition for Writ of Certiorari to review the judgment (on reargument) of the United States Court of Appeals for the Third Circuit, sitting *en banc*, entered on October 9, 1973, as amended by its judgment entered on November 6, 1973 (rehearing denied November 7, 1973), to the extent that it reversed in part Order No.

613 of the United States District Court for the Eastern District of Pennsylvania entered on March 16, 1972, in Penn Central's reorganization proceedings under Section 77 of the Bankruptcy Act (11 U. S. C. § 205). In reversing in part Order No. 613, the Court of Appeals held that pre-bankruptcy interline freight and passenger balances due other railroads but collected by Penn Central are held in trust for such railroads.

Respondent, Chicago and North Western Transportation Company (North Western), intends to file on or before February 5, 1974[1] a Petition for Writ of Certiorari to review the judgment of the Court of Appeals for the Third Circuit to the extent that it affirmed in part Order No. 613 of the District Court as it applied to pre-bankruptcy per diem balances. The Court of Appeals affirmed the District Court's order enjoining the railroads from setting off per diem balances owed by Penn Central against amounts owed to Penn Central, and its refusal to order immediate payment of, or to declare an equitable lien or constructive trust for, such balances. The Court of Appeals concluded, as did the District Court, that despite the railroads' legal obligation under the Interstate Commerce Act (49 U. S. C. § 1 *et seq.*) to interchange freight cars, the railroads, including North Western, voluntarily extended credit to Penn Central in the amount of the per diem balances.

Two questions to be presented in North Western's petition will be whether, in a Section 77 reorganization, the pre-bankruptcy per diem balances which are created when railroads interchange freight cars under compulsion of federal law, are claims of involuntary creditors superior to claims of voluntary creditors; and whether a reorganization court must order payment or permit setoff of pre-bankruptcy per diem claims, or

1. North Western filed a Petition for Limited Rehearing En Banc within the period prescribed for such filing under the Rules of the Court of Appeals for the Third Circuit. Rehearing was denied on November 7, 1973.

Respondents, Grand Trunk Western Railroad Company and St. Louis-San Francisco Railway Company, have advised North Western that they wish to join in its Petition for Writ of Certiorari.

declare an equitable lien or constructive trust for such claims, unless the court finds that to grant such relief will substantially increase the likelihood that reorganization will fail.

Among the reasons to be presented for the granting of North Western's petition will be that determination by this Court of the status of pre-bankruptcy per diem balances is necessary to the proper administration of Section 77 of the Bankruptcy Act in conformity with Congressional transportation policy embodied in the Interstate Commerce Act, particularly Section 1(14)(a), and in the last sentence of Section 77(j) of the Bankruptcy Act.

CONCLUSION.

This Memorandum is submitted to advise the Court of the Petition for Writ of Certiorari to be filed by North Western, and to respectfully suggest that the Court may wish to defer final action on the Trustees' petition until after North Western's petition has been filed or the time for its filing has expired.

Respectfully submitted,

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